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IN THE

Supreme Court of the United States

October Term, 1966

No. 732

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR., as COMPTROLLER of NASSAU COUNTY,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

GEORGE MORTON LEVY,
Counsel for Appellant,
Office & Post Office Address,
1539 Franklin Avenue,
Mineola, New York.

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IN THE

Supreme Court of the United States

October Term, 1966

No. ———

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR., as COMPTROLLER of NASSAU COUNTY,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the bases upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order of remittitur of the Court of Appeals of the State of New York, and the judgment made and entered upon said remittitur, from which this appeal is taken, and that the Supreme Court of the United States should exercise such jurisdiction in this case.

Opinions Delivered in the Courts Below

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, is reported at 25 A. D. 2d 595, 267 N. Y. S. 2d 591.

The opinion of the Court of Appeals of the State of New York is reported at 18 N. Y. 2d 30, 271 N. Y. S. 2d 662.

Copies of said opinions are appended to this statement pursuant to Rule 15(1)(h) of the Rules of the Supreme Court of the United States. The opinion of the Appellate Division, Second Department, appears at page 17a of the Appendix, and the opinion of the Court of Appeals appears at page 9a of the Appendix.

Jurisdiction

This proceeding was brought by appellant in the Supreme Court of the State of New York, County of Nassau, pursuant to Article 78 of the New York Civil Practice Law and Rules, to review a determination of appellee Comptroller of Nassau County, which assessed a deficiency against appellant on account of county admission taxes. By order of the Supreme Court, Nassau County, the proceeding was transferred for disposition to the Appellate Division, Second Department.

The proceeding was brought upon the grounds, among others, that the Nassau County Local Law under which the admissions tax deficiency had been assessed (*Nassau County Local Law No. 1, 1956*), and the enabling act of the New York State Legislature which authorized the adoption of said local law (*Laws of 1956, Chapter 837*), were unconstitutional and void in that said enactments denied to the appellant the equal protection of the laws, in violation of Amendment XIV of the Constitution of the United States, and Article I, Section 11 of the Constitution of the State of New York.

This appeal is taken from the order of remittitur of the Court of Appeals of the State of New York, and from the judgment on remittitur of the Supreme Court, Nassau County (*Department of Banking* v. *Pink,* 317 U. S. 264). The order of remittitur was made and entered on June 9, 1966. The judgment on remittitur was made and entered on July 6, 1966. Notice of appeal was filed on September 2, 1966 with the Clerk of the Supreme Court, Nassau County, the same being the Court possessed of the record.

The Supreme Court of the United States has jurisdiction to review by appeal the said order of remittitur and judgment on remittitur by the provisions of 28 U. S. C. § 1257 (2).

The following decisions of the Supreme Court of the United States, on appeal, in which the Court reviewed the issue of repugnancy of State taxes to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, are believed to sustain the jurisdiction of the Supreme Court to review on appeal the order of remittitur and judgment on remittitur herein: *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522; and *Wheeling Steel Corporation* v. *Glander,* 337 U. S. 562.

The Statutes Involved

This appeal involves the validity of an enabling act of the Legislature of the State of New York, which authorized certain counties within the State to adopt local laws increasing the rate of the local tax on admissions to certain pari-mutuel harness horse race meetings, and of a local law adopted by Nassau County pursuant to such enabling act. The enabling act is Chapter 837, Section 3, of the Laws of 1956. The statute as amended is set forth in Book 65, Part 3 of McKinney's Consolidated Laws of New York Annotated, at page 499; and is cited as McK. Unconsol. laws § 9502. Its text follows:

CHAPTER 837

An Act to amend the pari-mutuel revenue law, in relation to capital improvements to harness race tracks and to the granting of licenses in connection therewith; and to amend chapter one hundred forty-eight of the laws of nineteen hundred fifty-two, entitled "An act to enable certain counties and cities to impose a tax on admissions to harness horse race meetings and providing for the collection and administration of such tax," in relation to increasing the amount of such tax.

Became a law April 19, 1956, with the approval of the Governor.

Effective April 19, 1956.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

• • •

§ 3. Section two of chapter one hundred forty-eight of the laws of nineteen hundred fifty-two, entitled "An act to enable certain counties and cities to impose a tax on admissions to harness horse race meetings and providing for the collection and administration of such tax," as last amended by chapter two hundred eighty-seven of the laws of nineteen hundred fifty-four, is hereby amended to read as follows:

§ 2. In cities or counties adjacent to a city having a population in excess of two million, any local law adopted pursuant to section one of this act shall require every corporation, association or person holding a harness horse race meeting within the area to which such law is applicable, to collect in addition to the admission price of tickets sold or otherwise disposed of to patrons for admission, for each such meeting held by such corporation, association or persons, a tax not in excess of thirty per centum of such admission price. In all other cities or counties, any local law adopted pursuant to section one of this

act shall require every corporation, association or person holding a harness horse race meeting within the area to which such law is applicable, to collect in addition to the admission price of tickets sold or otherwise disposed of to patrons for admission, for each such meeting held by such corporation, association or person, a tax not in excess of fifteen per centum of such admission price. In case of failure to collect such tax the same shall be imposed upon the corporation, association or person holding such meeting. Such tax shall be paid to the county or city within ten days after the close of each such meeting. The amount so collected shall be deposited in the general fund of the county or city and, unless restricted by local law to a specified purpose or purposes, shall be available for any lawful county or city purpose.

The local law is Nassau County Local Law No. 1, 1956, which amends § 4-2.1 of the Nassau County Administrative Code by increasing the rate of the County admissions tax imposed thereby. Its text follows:

LOCAL LAW NO. 1, 1956

A Local Law to amend the Nassau County administrative code, in relation to harness horse race admissions taxes

(Became a law April 16, 1956 with the approval of the County Executive. Passed by the Board of Supervisors of the County of Nassau.)

Be it Enacted by the Board of Supervisors of the County of Nassau, as follows:

Section 1. Section 4-2.1 of the Nassau County administrative code, as last amended by local law number one of nineteen hundred fifty-four, is hereby amended to read as follows:

§ 4-2.1 Imposition of tax. A tax is hereby imposed on all admissions to harness horse race meetings conducted at race meeting grounds or enclosures located within the county of Nassau at the rate of thirty per centum of the admissions price. The racing

association or corporation conducting a harness horse race meeting shall, in addition to the admissions price, collect such tax on all tickets sold or otherwise disposed of to patrons for admission with the sole exception of those issued free passes, cards or badges in accordance with the specific authority of the laws of the State of New York. In case of failure to collect such tax the tax shall be imposed on the racing corporation or association conducting such meeting.

§ 2. This local law shall take effect immediately, provided the governor shall have approved the bill authorizing a thirty per centum tax. If said bill shall not have been approved on or before the day the county executive approves this local law, then this local law shall take effect on the day the governor approves said bill.

Questions Presented

The enabling act authorized the increase of local admissions taxes to pari-mutuel harness horse race meetings from a statutory maximum of 15% to a statutory maximum of 30%. The only State subdivisions which were authorized to increase the admissions tax rate are cities and counties adjacent to a city having a population in excess of two million.

No increase in the 15% local tax rate was authorized with respect to admissions to running horse race meetings, as distinguished from harness horse race meetings. The local admisions tax to running horse race meetings everywhere in the State remains limited by State statute to 15%. McK. Unconsol. L. § 9522.

The only city in the State with a population in excess of two million is New York City; the only *city* adjacent to New York City which contains a harness race track is Yonkers, New York, in which Yonkers Raceway is located; and the only *county* adjacent to New York City which contains a harness race track is Nassau County, in which

appellant conducts Roosevelt Raceway. The local admissions tax increase to 30% is therefore, by the terms of the enabling act, limited in application to two particular enterprises, Roosevelt Raceway and Yonkers Raceway. The local admission tax to the running horse race tracks located in New York City and its environs (Aqueduct and Belmont) remains limited by State law to 15%.

The principal question presented is whether the above enabling act, and the local law adopted pursuant thereto, are unconstitutional because they deny to appellant the equal protection of the laws. The subsidiary questions fairly comprised therein include the following:

(1) Whether the enabling act, considered in conjunction with State legislation applicable to running race meetings, is unconstitutional because it discriminates without any conceivable rational justification between those race tracks that conduct harness horse race meetings and those that conduct running horse race meetings.

(2) Whether the enabling act is unconstitutional because it discriminates among harness race tracks on the basis of whether the city or county in which the harness race track is located is adjacent to the City of New York.

(3) Whether the enabling act is unconstitutional because it is so drawn as to limit the class subject to the increased tax rate to two particular enterprises.

Statement of the Case

Appellant is a corporation organized under the Pari-Mutuel Revenue Law of the State of New York. It is licensed to conduct harness race meetings with pari-mutuel betting, and has conducted such meetings at Roosevelt Raceway in Nassau County since 1940, the year in which

the New York Legislature legalized pari-mutuel betting on horse races by adopting the Pari-Mutuel Revenue Act (Laws of 1940, Chapter 254). The original enactment prohibited any county or municipality from imposing any admissions taxes on pari-mutuel tracks.

In 1952, the Legislature for the first time authorized counties and cities to impose a tax on admissions to horse race meetings conducted in such counties or cities (L. 1952, c. 148; McK. Unconsol. L. §§ 9501, 9521). The maximum tax rate was fixed at 15% for harness tracks and running tracks alike, throughout the State (McK. Unconsol. L. §§ 9502, 9522).

In 1956, the above enabling act was adopted, authorizing an increase of admission taxes to 30% only for harness race tracks located in a city or county adjacent to a city having a population of over two million. Nassau County increased the admission tax payable by appellant to the new maximum rate of 30% by adoption of Local Law No. 1, 1956, to take effect immediately upon the Governor's approval of the enabling act.

In 1964, appellant filed its tax return for the period from July 30, 1964 to September 28, 1964, showing an unpaid balance of $8,695.46, and claiming that the Nassau County admission tax is unconstitutional, illegal and discriminatory. In the tax return, appellant stated that all admission tax payments in 1964 had been made under protest, and that appellant proposed to test the validity of the admission tax in a court of competent jurisdiction.

The Nassau County Comptroller made his written determination dated October 15, 1964, of an admissions tax deficiency in the said amount of $8,695.46. In conformity with Nassau County Administrative Code § 4-2.4, appellant, within 30 days thereafter, filed its protest against the deficiency determination, and, at appellant's request, hearings were held before the Comptroller on December 1 and December 16, 1964 with respect to the validity of the tax. The

Comptroller made his written determination dated December 30, 1964 disclaiming jurisdiction to pass upon the constitutionality of the tax and rejecting the protest. As required by Nassau County Administrative Code § 4-2.7, appellant instituted this proceeding to review the Comptroller's determination within 90 days thereafter. Appellant's petition to the Supreme Court, Nassau County asserts in Paragraph 25 the repugnance of the admission tax to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and prays for judgment declaring the local law in contravention of the Fourteenth Amendment.

After joinder of issue, the matter was transferred to the Appellate Division, Second Department for determination. The matter was determined upon the pleadings, including the transcript of the hearing before the Comptroller annexd as an exhibit to the petition. The federal constitutional question was further presented to the Appellate Division in briefs and oral argument and the Appellate Division, by order dated February 14, 1966, annulled the Comptroller's determination and granted the petition, on the ground that the enabling act and the local law deprived appellant of the equal protection of the laws, three justices concurring and two dissenting.

Appellees appealed to the Court of Appeals, wherein the federal constitutional question of repugnance to the equal protection clause, in addition to non-federal grounds, were presented to the Court by the record on appeal, and the briefs and oral arguments of counsel. The Court of Appeals, five judges concurring and two dissenting, reversed the order of the Appellate Division, holding, with respect to the federal constitutional question, that the enabling act and the local law were not repugnant to the equal protection clause. Appellant thereafter moved for an amendment of the remittitur of the Court of Appeals to state the federal constitutional question passed upon by the

Court. The Court of Appeals denied the motion (N. Y. Law Journal, September 27, 1966) as unnecessary since the federal constitutional question is discussed and passed upon in the Court's opinion.

The Questions Presented are Substantial

The decision below has sustained the validity of a tax statute which, in purpose and effect, singles out two harness tracks, Roosevelt Raceway and Yonkers Raceway, for unique and doubly onerous tax liability, as compared with running tracks engaged in substantially the same business in the same metropolitan area. If the enabling act had designated Roosevelt Raceway and Yonkers Raceway by name as the sole entities to which the higher tax rate could be applied, it could not be seriously disputed that their constitutional right to the equal protection of the laws had been denied to them. (*Morey* v. *Doud,* 354 U. S. 547.) In this case the enabling act, instead of naming these tracks explicitly, defines the class to be subjected to the increased tax in such a way that it applies, and can only apply, to these two particular enterprises, although two other running tracks are similarly situated. The federal question presented by this appeal, therefore, involves the extent to which the equal protection clause protects individual enterprises against tax legislation which singles them out for added tax liability.

The constitutional limitations upon the classification power of the states have been frequently considered by the Supreme Court of the United States (*e.g., Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Hartford S.B.I. & Ins. Co.* v. *Harrison,* 301 U. S. 458; *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522) and the applicable principles are well settled. The State's discretion in classification is broad, particularly in taxation, and will be sustained unless there is no reasonable basis for the classification adopted. If any state of facts reasonably can be con-

ceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed. (*Lindsley* v. *Natural Carbonic Gas Co., supra,* at p. 78.)

Applying these tests, a majority of the Appellate Division below concluded that there was no rational basis for the classification employed in the enabling act, and a majority of the Court of Appeals concluded that there may have been such reasonable basis.

This case, however, differs significantly from other cases that have come before the Supreme Court of the United States in which tax classifications have been sustained. Here, the membership in the class being regulated by the State is itself extremely small (the number of pari-mutuel harness tracks is limited by State law to eight, under McK. Unconsol. L. § 8006, and the number of pari-mutuel running tracks is limited to nine under McK. Unconsol. L. § 7971). Accordingly, the exercise of the power to sub-classify within this group is likely to confine the impact of the legislation to a single member or as in this case, two members. While this fact does not, in and of itself, take from the State the power to classify in the adoption of police and tax laws, it emphasizes the pertinence of the "caution" added to the traditional rules by this Court in *Morey* v. *Doud,* 354 U. S. 457 at page 464, that " 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' "

The federal question is thus particularly substantial in this case where the adoption of an apparently arbitrary distinction lends itself to the selection of individual members of a small class as objects of discriminatory legislation. *Hillsborough Township* v. *Cromwell,* 326 U. S. 620, 623.

In this case, the classification in the enabling act distinguished between racetracks conducting harness races and those conducting running races. The difference between the two kinds of horse races clearly has no relevance to tax rates (e.g., the position of the jockey astride the horse compared with that of a driver in a sulky; the different gait of the horse; or the general practice of conducting harness races at night and running races in the daytime). This Court has repeatedly held that the mere existence of differences is not sufficient to sustain the classification—the discrimination must have some reasonable relation to these differences. (*Hartford S.B.I. & Ins. Co.* v. *Harrison*, 301 U. S. 458, 463; *Louisville Gas & E. Co.* v. *Coleman*, 277 U. S. 32, 37). Here, as the record indicates (p. 19a), the two kinds of racing are part of a single sport, and compete with each other for the same public patronage.

We submit that no rational justification for the discriminatory tax herein imposed has been or can be suggested. When the question was presented at the hearing before the Comptroller of Nassau County, the presiding Supervisor of the Board of Supervisors frankly said that "I don't know how you can make distinctions between a horse that runs with . . . a sulky and a horse that runs without it."

In the Appellate Division, the Court held that:

> "There is no rational basis for a distinction between a tax on running tracks and one on harness tracks. They are both parts of a single sport of horse racing" (App. p. 19a).

In the Court of Appeals, Chief Judge Desmond said:

> "We do not know what prompted the legislature to permit a 30% impost on harness tracks only" (App. p. 15a).

The Court however speculated that since harness racing is "generally carried on at night and flat racing in the

daytime," the Legislature might have considered "that night operations result in greater municipal costs than those in the daytime" (App. p. 15a). There was not a scintilla of evidence to support this in the record nor are we able to hazard any guess as to the greater expense the municipality may be put to where the track runs at night rather than during the daytime. The only difference is that the nighttime operation is artificially illuminated—but the track, not the County, supplies the illumination. If anything, the State derives a greater revenue from a nighttime operation in view of the utility tax imposed upon electricity.

The Court of Appeals also conjectured that "there is little public transport" in Nassau and Westchester County so that the Legislature might have considered that these tracks "require expenditure by the localities of larger amounts for highways" (App. p. 15a). Again, there was no evidence of this in the Record. If common knowledge is the basis of the Court's reasoning, it is well known that the major highways which criss-cross Westchester and Nassau Counties and service the metropolitan tracks were built by federal and state funds and are part of an interstate highway system. We do not understand that any county contributions were made to any of these highways.

If, as the Court of Appeals suggested, the reason for the discrimination is "that the two harness tracks which could be affected by these two increased admissions taxes are in the heavily populated metropolitan area" (App. p. 15a) what reason is there to justify a lower tax on running tracks which are even more centrally located in the same heavily populated metropolitan area?

The Court of Appeals also called attention to the fact that running tracks and harness tracks are regulated by different commissions; that the pari-mutuel tax rate is computed under a different formula; and that legislation

dealing with the modernization of running tracks and harness tracks involved the use of different formulae (App. pp. 12a-13a). Certainly, the existence of different administrative agencies does not warrant a double tax on harness tracks; the distinction in pari-mutuel formula is no difference at all since application of the formula results in substantially the same tax on both the flat and harness tracks and the difference in the modernization formulae actually redounded to the financial benefit of the running tracks, as compared with the harness tracks—a distinction in favor of running tracks certainly would not warrant an increased admissions tax burden on harness tracks as compared with running tracks.

In conclusion, Chief Judge Desmond said:

> "We will never know what in fact moved the Legislature. . . ."

We submit that there is nothing which can be suggested or imagined which could conceivably justify a 30% tax on harness tracks located in Nassau and Westchester Counties as compared with the 15% tax on a running track located partially in Nassau County and the City of New York and another running track located entirely in New York City.

CONCLUSION

It is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code.

Respectfully submitted,

GEORGE MORTON LEVY,
Counsel for Appellant.

APPENDIX

Order of Remittitur of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of June in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS:

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

2. No. 133. 66

In the Matter

of

the Application of ROOSEVELT RACEWAY, INC.,
Respondent,

For a review &c.

VS.

COUNTY OF NASSAU & ANO., &C.,
Appellants.

BE IT REMEMBERED, That on the 15th day of March in the year of our Lord one thousand nine hundred and sixty-six, County of Nassau & ano., &c., the appellants in this

cause, came here unto the Court of Appeals, by Morris H. Schneider, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Roosevelt Raceway, Inc., the respondent in said cause, afterwards appeared in said Court of Appeals by George Morton Levy, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Seymour S. Ross, of counsel for the appellants, and by Mr. George Morton Levy, of counsel for the respondent, and by Mr. Joel Lewittes, of counsel for the Attorney General, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs in this Court and in the Appellate Division, and the matter remitted to the Comptroller of Nassau County for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now

Order of Remittitur of the Court of Appeals

remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE, } ss.:
Albany, June 9, 1966. }

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

Judgment on Remittitur with Bill of Costs and Notice of Entry

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

In the Matter

of

The Application of ROOSEVELT RACEWAY, INC.,
Petitioner,

For a review under Article 78 of the determination of the County Comptroller and for a judgment or decree declaring unconstitutional and null and void Local Law I-1956 imposing a 30% admissions tax on harness horse race meets, and related relief

against

COUNTY OF NASSAU and PETER P. ROCCHIO, SR. AS COMPTROLLER OF NASSAU COUNTY,
Respondents.

The above named respondents, County of Nassau and Peter P. Rocchio, Sr., as Comptroller of Nassau County, having appealed to the Court of Appeals from the Order of the Appellate Division, Second Department, entered in the Office of the Clerk of said Appellate Division the 14th day of February, 1966, (1) annulling the determination of respondent, Comptroller of Nassau County, made December 30, 1964, assessing a deficiency against petitioner on account of County admissions taxes, and (2) granting judgment that Chapter 837 of the Laws of 1956 of Nassau County Local Law No. 1 of 1956 are unconstitutional and void, and the said appeal having come on to be heard before the Court

Judgment on Remittitur with Bill of Costs and Notice of Entry

of Appeals, and the Court of Appeals having duly made an order reversing the aforesaid order of the Appellate Division, with costs in the Court of Appeals and in the Appellate Division, and remitting the matter to the Comptroller of Nassau County for further proceedings in accordance with the opinion of the Court of Appeals, a copy of which order and Record on Appeal in the Court of Appeals was remitted and filed in the Office of the Clerk of the County of Nassau on the 17th day of June, 1966, and the Comptroller of Nassau County, in accordance with the order and opinion of the Court of Appeals, having duly assessed a tax deficiency of $8,695.46 against petitioner on account of unpaid County Admissions taxes, plus penalty of $434.77 and interest of $1,739.00, totaling $10,869.23, and the costs and disbursements of the respondents having been duly taxed in the sum of $1,086.20.

Now, on the motion of Morris H. Schneider, Exec. Bldg., Mineola, N. Y., attorney for the respondents, County of Nassau and Peter P. Rocchio, Sr., as Comptroller of Nassau County, it is

ADJUDGED, that the order of the Appellate Division, Second Department, entered on the 14th day of February, 1966, be and the same hereby is in all respects reversed, and it is further

ADJUDGED, that the respondent, County of Nassau, and Peter P. Rocchio, Sr., as Comptroller of Nassau Co., Mineola, New York, recover of petitioner, Roosevelt Raceway, Inc., Westbury, New York, the sum of $10,869.23, plus statutory interest, pursuant to section 4-2.11 of the Nassau County Administrative Code, accruing after July 8, 1966, together with the sum of $1,286.80, costs and disbursements as taxed, making in all the sum of $12,155.43, and the respondents have execution therefor.

Judgment signed and entered this 6th day of July, 1966.

FRANKLIN H. ORNSTEIN,
Clerk.

Costs and Disbursements

(BILL OF COSTS)

SUPREME COURT

COUNTY OF NASSAU

Index No. 3101-1965

In the Matter

of the

Application of ROOSEVELT RACEWAY, INC.,

Petitioner,

against

COUNTY OF NASSAU, *et al.*,

Respondents.

Costs

Appeal to App. Div. or App. Term before argument CPLR § 8203 subd. 1	$25.00
Appeal to App. Div. or App. Term for argument... CPLR § 8203 subd. 2	50.00
Appeal to Court of Appeals before argument..... CPLR § 8204 subd. 1	50.00
Appeal to Court of Appeals for argument..... CPLR § 8204 subd. 2	75.00
COSTS	$200.00
DISBURSEMENTS	1086.20
TOTAL	$1286.20

Costs and Disbursements

Disbursements

Paid printing cases—Court of Appeals CPLR § 8301(a)6	$390.00
Paid Printing Brief—Court of Appeals	501.20
Paid Printing Brief—Appellate Division	195.00
TOTAL	$1086.20

(ATTORNEY'S AFFIRMATION)

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

The undersigned, an attorney admitted to practice in the courts of this state, affirms: that he is a Deputy County Attorney in the office of Morris H. Schneider, County Attorney of Nassau Co. the attorney of record for the Respondents in the above entitled action; that the foregoing disbursements have been or will necessarily be made or incurred in this action and are reasonable in amount and that each of the persons named as witnesses, attended as such witness on the trial, hearing or examination before trial herein the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names, from the place of said trial, hearing or examination; and each of said persons, as such witness as aforesaid necessarily traveled the number of miles so set opposite their names, in traveling to, and the same distance in returning from the same place of trial, hearing or examination; and that copies of documents or papers as charged herein were actually and necessarily obtained for use.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: June 23, 1966.

WILLIAM D. SIEGEL.

Costs—Adjusted at $1286.20 this 6th day of July 1966.

FRANKLIN H. ORNSTEIN,
Clerk, Nassau Co.

Costs and Disbursements

(NOTICE OF ENTRY)

Sirs:

PLEASE TAKE NOTICE that the within are true copies of a judgment on remittitur entered in the Office of the Clerk of the County of Nassau on the 6th day of July, 1966, and the items of costs and disbursements in the within action as taxed, pursuant to sections 8204 and 8403 of the CPLR, by the Clerk of the County of Nassau, at his office, in Mineola, New York on the 6th day of July, 1966 and the amount inserted in the Judgment Roll.

Dated: Mineola, New York,
July 6th, 1966.

Yours, etc.,

MORRIS H. SCHNEIDER,
County Attorney of Nassau County,
Attorney for Respondents,
Office and Post Office Address,
Executive Building,
Mineola, New York.

To:

GEORGE MORTON LEVY, Esq.,
Attorney for Petitioner,
1539 Franklin Avenue,
Mineola, New York.

Opinion of the Court of Appeals

DESMOND, *Chief Judge.*

This article 78 CPLR proceeding was brought against Nassau County and its County Comptroller to challenge the validity under the Federal and State Constitutions of chapter 837 of the Laws of 1956, McK. Unconsol. Laws, §§ 8008, 8020, 9502, and Nassau County Local Law No. 1 of 1956 pursuant to which the county by authorization of the State statute imposed a 30% tax on admissions to the harness horse races held at petitioner's racetrack in Nassau County (which tax petitioner paid from 1956 until 1964). By earlier laws passed in 1952 (chs. 148, 236) and in 1954 (chs. 285, 287) McK. Unconsol. Laws, § 9501 et seq., the State gave its permission to all counties (availed of by Nassau in 1954) to levy a 15% tax on such admissions. The 1956 State law change made possible an increase from 15% to 30% of county-collected admissions taxes at harness tracks in cities or counties adjacent to a city having a population in excess of two million, that is, to New York City.

The Appellate Division by a vote of 3 to 2 held that the 1956 State statute and the Nassau County local law passed pursuant thereto were unconstitutional because of lack of a rational basis for a distinction between a tax on running tracks (as to which counties are allowed to impose a 15% admissions tax only) and harness tracks in the metropolitan area. This, said the Appellate Division majority, denied to petitioner equal protection of the laws. One of the Justices who made up the majority, while concurring in this specification of unconstitutionality, thought that the State statute had been invalidly passed since, so he reasoned, it was in effect a local law and so, under the Home Rule provisions of the State Constitution (art. IX, § 1, subd. [b], as it was in 1956), required a request therefor by the Board of Supervisors of the county or a certificate

of necessity signed by the Governor. It had neither. The two dissenting Justices, pointing to the settled rule that "In matters of taxation, the Legislature has broad powers of classification", concluded that it was not arbitrary or lacking in reason to find distinctions between the two types of horse race meetings and that there was no violation of either Constitution.

Before arriving at the prime constitutional question (equal protection) we consider several other grounds of alleged invaladity asserted by petitioner but all rejected by the Appellate Division. In the first of these petitioner says that the 1956 statutory change despite its general verbiage was actually directed at petitioner's track in Nassau County and a similar harness racing track at Yonkers in Westchester County and so was a law local in its terms or in its effect requiring under (former) article IX (§ 1, subd. [b]) of the New York State Constitution a request from the local Board of Supervisors for a certificate of necessity transmitted by the Governor to the Legislature. It is true that limiting this authorized tax increase to cities or counties adjacent to New York City reduced its coverage to these two tracks since no other harness race tracks operate in that area. But such geographical classifications are old in New York law and have consistently been upheld (People v. Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247; Farrington v. Pinckney, 1 N. Y. 2d 74, 150 N. Y. S. 2d 585, 133 N. E. 2d 817; Matter of Four Maple Drive Realty Corp. v. Abrams, 2 A. D. 2d 753, 754, 153 N. Y. S. 2d 747, 750, app. dsmd. 2 N. Y. 2d 837, 159 N. Y. S. 2d 976, 140 N. E. 2d 870, app. dsmd. 355 U. S 14, 78 S Ct 22, 2 L Ed 2d 21; Spatt v. City of New York, 13 N. Y. 2d 618, 240 N. Y. S. 2d 605, 191 N. E. 2d 91, app. dsmd. 375 U. S. 894, 84 S. Ct. 451, 11 L. Ed. 2d 411). In 1898 in Matter of Henneberger, 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132 this court said that "good reasons exist why, in a general

law, reference may be had to conditions of population, whether in counties, cities, towns or villages, or with respect to a proximity to cities of a certain growth" (pp 429-430, 50 N. E. p. 64). In 1944 in Stapleton v. Pinckney, 293 N. Y. 330, 334, 57 N. E. 2d 38, 39, 155 A. L. R. 783 we said that a statute need not be classified as local for Home Rule purposes but although it contained classifications "based upon population or upon proximity to great centres of population may be a general law though only a single municipal corporation or locality can at the time receive its benefits" (see, similarly, Robinson v County of Broome, 276 App. Div. 69, 93 N. Y. S. 2d 662 [1949], affd. 301 N. Y. 524, 93 N. E. 2d 77 [1950]). It is to be kept in mind that enactment of tax laws is a State function but that the State may "delegate to a county or city power to assess and collect taxes in different ways" (County Securities v. Seacord, 278 N. Y. 34, 37, 15 N. E. 2d 179, 180). It is important, too, as to the Home Rule point, that chapter 837 of the Laws of 1956 is permissive, not mandatory (see New York Steam Corp. v. City of New York, 268 N. Y. 137, 143, 144, 197 N. E. 172, 173, 174; 99 A. L. R. 1157).

Next, petitioner argues that the Nassau County enactment was void in that at the time of its passage Nassau County had no present authority since its local law was passed three days before the State enabling act was signed by the Governor. However, the local law itself took care of this by providing that it should take effect immediately if the Governor meanwhile should have approved the State act, but that, if the Governor should not have attached his signature to the State enactment on or before the approval of the local law, the latter should take effect on the day on which the Governor should approve the State bill. Such arrangements for a statute taking effect on the happening of some future event do not result in invalidity (see Barto v. Himrod, 8 N. Y. 483, 490).

Another argument against the validity of the admissions tax increase is that such local taxation of racetracks is not permitted under section 9 of article I of the State Constitution. That section created an exception to the constitutional prohibition of gambling and permitted parimutuel betting on horse races "as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government". Petitioner would have us read that language to mean that the county, as distinguished from the State itself, may not be authorized to collect a tax on admissions to any racetrack where there is pari-mutuel betting. However, the right of the State to tax or to permit a county to tax racetrack admissions is not based on or affected by that part of section 9 of article I. The tax with which we are here concerned is not a tax on betting but on admissions fees charged for entering the racetrack. There is a substantial difference between those two kinds of taxes.

We arrive now at the major issue, that is, as to the constitutionality of taxing admissions fees to the two kinds of racetracks at two different rates. The Appellate Division wrote that "there is no rational basis for a distinction between a tax on running tracks and one on harness tracks. They are both parts of a single sport of horse racing." The first answer to that is that the Legislature in many other statutes has ordered different treatment for "flat tracks" and "harness tracks". For instance, corporations conducting running races are subject to license and control by the State Racing Commission (L. 1926, ch. 440, as amd., § 6 et seq., McK. Unconsol. Laws, § 7907 et seq.) while harness track racing is controlled and licensed by a different commission with different powers (Pari-mutuel Revenue Law [L. 1940, ch. 254, as amd.], § 35 et seq., McK. Unconsol. Laws, § 8001 et seq.). The State's taxation of betting at running tracks is at a rate and formula different from the tax on betting at the harness tracks (compare

L. 1940, ch. 254, as amd., §§ 9 and 9-a with § 45, McK. Unconsol. Laws, §§ 7959, 7960, 8019). The fixation of the local admissions tax on these two kinds of tracks was by different statutes (see L. 1952, chs. 148, 236). The Legislature has at various times provided financial assistance to both kinds of tracks for modernization of their facilities, and this again was done under different statutes and under quite different formulae (compare, for instance, L. 1956, ch. 837, with L. 1955, ch. 813, and L. 1957, ch. 355, McK. Unconsol. Laws, §§ 7954, 7959, 7960, 7972). It is thus apparent that the Legislature, for whatever reason, has consistently and over a period of years put these two kinds of racetracks into different classifications for purposes of control and taxation.

In Matter of Keeney's Estate, 194 N. Y. 281, 286, 87 N. E. 428, 429 we said this: "The right and power of governments to single out certain classes of objects for taxation, leaving other classes exempt or taxed at a different rate, or in a different manner, is unquestionable. * * * Such power has been exercised by all governments from the earliest times." The *Keeney* opinion went on to say that the exercise of this power is subject to one condition only, that is, that the classification must not be " 'so purely arbitrary as to have no reason, not even an insufficient or merely plausible reason, to justify it.' " We put the same idea into other words in Matter of 436 West 34th St. Corp. v. McGoldrick, 288 N. Y. 346, 349, 350, 43 N. E. 2d 436, 437 when we wrote that such classifications for taxation purposes are valid unless "based on fictions or on arbitrary or unreasonable assumptions of fact" or unless they indicate "hostile or oppressive discrimination" and that "The question of constitutional validity disappears when it cannot be said that no state of facts reasonably justifying the classifications can be conceived". Still another formulation of this principle is in McGowan v. State

of Maryland, 366 U. S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 where it was written that "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." The controlling authorities which express and apply this concept are literally innumerable, including our 1964 decision (cited by the Appellate Division majority) of Ampco Print.-Advertisers' Offset Corp. v. City of New York, 14 N. Y. 2d 11, 24, 247 N. Y. S. 2d 865, 872, 197 N. E. 2d 285, app. dsmd. 379 U. S. 5, 85 S. Ct. 47, 13 L. Ed. 2d 21, where we remarked that " 'in taxation there is a broader power of classification than in other exercises of legislation.' " *Ampco* cited People ex rel. Hatch v. Reardon, 184 N. Y. 431, 445, 77 N. E. 970, 974, 8 L. R. A., N. S., 314, affd. 204 U. S. 152, 27 S. Ct. 188, 51 L Ed 415, where it was recalled that "Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and Federal courts * * * The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs" In the last paragraph of the *Ampco* opinion there is a considerable list of tax laws validated by the United States Supreme Court which upheld taxing discriminations as to the justice and reasonableness of which judgments might differ. The conclusion of the *Ampco* opinion was that such distinctions may not be considered arbitrary or violative of the equal protection clause where a state of facts reasonably can be conceived that would sustain it (see Matter of 436 West 34th St. Corp. v. McGoldrick, 288 N. Y. 346, 350, 43 N. E. 2d 436, 437, supra).

Our question then is this: is there any conceivable justification for this particular statutory classification? We

do not know what prompted the Legislature to permit a 30% impost on harness tracks only and in certain parts of the State only. But differences have been recognized by the Legislature for a long time and it is for the Legislature, not for us, to say how these differences are to be taken account of. The differences must be substantial but "need not be great" (State Board of Tax Comrs. of Indiana v. Jackson, 283 U. S. 527, 538, 51 S. Ct. 540, 75 L. Ed. 1248, and list of instances at that page; see, also, Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237, re taxing anthracite and not bituminous coal, and Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109, as to taxing oleomargarine differently from butter). For instance, harness racing is generally carried on at night and flat racing in the daytime. The Legislature could have come to the conclusion that night operations result in greater municipal costs than those in the daytime. Then, too, the harness racing tracks subject to the 30% authorization are in Nassau and Westchester Counties where there is little public transport and very large attendance and these tracks might be thought to require expenditure by the localities of larger amounts for highways. It can be judicially noticed and appears from official statistics that the two harness tracks which could be affected by these two increased admissions tax are in the heavily populated metropolitan area, again justifying the conclusion that local government would be put to greater expense thereby than would be the case in rural areas. We will never know what in fact moved the Legislature but we cannot say there is nothing in the local governmental legislation and management of a harness racing track adjacent to the metropolitan area, which is sufficiently different from running tracks elsewhere in the State, to warrant an authorization by the Legislature for the enactment of a different tax on admissions on these particular harness tracks.

Two other points should be mentioned as to both of which we agree with the Appellate Division. We hold that petitioner, being required by law to collect and pay over this tax, is a party aggrieved and so has standing to maintain this proceeding. We also agree with the court below that constitutionality may be tested out in an article 78 proceeding like this one (see CPLR 7803, subd. 2).

The order appealed from should be reversed, the petition dismissed and the County Comptroller's determination confirmed, with costs in this court and in the Appellate Division.

FULD, BURKE, BERGAN and KEATING, *JJ.*, concur with DESMOND, *C. J.*

VAN VOORHIS and SCILEPPI, *JJ.*, dissent and vote to affirm.

Order reversed, with costs in this court and in the Appellate Division, and matter remitted to the Comptroller of Nassau County for further proceedings in accordance with the opinion herein.

Opinion of the Appellate Division

MEMORANDUM BY THE COURT

Proceeding pursuant to article 78 of the Civil Practice Law and Rules: (1) to review a determination of respondent Comptroller of Nassau County, made December 30, 1964 after a hearing, assessing a deficiency against petitioner on account of county admission taxes; and (2) for judgment that chapter 837 of the Laws of 1956 and Nassau County Local Law No. 1 of 1956 are unconstitutional and void.

By order of the Supreme Court, Nassau County, entered June 21, 1965, the proceeding has been transferred to this court for disposition.

Determination annulled and petition granted, with costs.

By statutes enacted in 1952 and 1954 (L. 1952, chs. 148, 236; L. 1954, chs. 285, 287) a tax of 15% on all admissions to harness horse race meetings and running horse race meetings was authorized. Pursuant to this enabling act, Nassau County adopted local laws imposing a 15% tax on all admissions to harness horse race meetings in the county (Nassau County Local Laws, No. 1—1952, No. 1—1954).

By statute enacted in 1956 (L. 1956, ch. 837) it was provided that, in cities or counties adjacent to a city having a population in excess of two million, a local law enacted pursuant to the statute shall require a tax of 30% on the admission price to a harness horse race meeting held within the area to which the local law is applicable. In all other cities and counties, the tax was to remain at 15% of the admission price to harness horse race meetings. Nassau County thereupon adopted a local law imposing a 30% tax on admissions to harness horse race meetings within the county (Nassau County Local Law 1—1956).

By this proceeding, petitioner attacks the constitutionality of the 1956 enabling act and of the said local law enacted thereunder. We are of the opinion that (1) the

proceeding may be maintained to test the constitutionality of those acts, despite the fact that there is no dispute as to the amount of the unpaid taxes (cf. Van Antwerp v. State of New York, 218 N. Y. 422, 427, 113 N. E. 497, 498; Matter of Policemen's Benevolent Ass'n of Westchester County v. Board of Trustees of Vil. of Croton-on-Hudson, 21 A. D. 2d 693, 695, 250 N. Y. S. 2d 523, 527; CPLR 7803, subd. 2; Nassau County Administrative Code, § 4-2.4); (2) petitioner is a party aggrieved, with standing to maintain the proceeding, despite the fact that the admision tax is imposed on the patron, since petitioner must collect and pay over the tax and is personally liable for the amount thereof upon its failure to do so (cf. Socony-Vacuum Oil Co. v. City of New York, 247 App. Div. 163, 165, 287 N. Y. S. 288, 290, affd. 272 N. Y. 668, 5 N. E. 2d 385; International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U. S. 435, 440, 64 S. Ct. 1060, 88 L. Ed. 1373); (3) petitioner is not estopped from challenging the constitutionality of the enabling act, despite the fact that it availed itself of substantial benefits conferred by independent and separable provisions of the same statute (cf. Thompson v. Consolidated Gas Co., 300 U. S. 55, 80-81, 57 S. Ct. 364, 81 L. Ed. 510; United States v. Rappeport, D. C., 36 F. Supp. 915, 917, affd. sub. nom. United States v. Herling, 2 Cir., 120 F. 2d 236); (4) the local law, which by its terms became effective upon the approval of the enabling act by the Governor, was not invalid because it was signed three days before the enabling act was approved (cf. Barto v. Himrod, 8 N. Y. 483, 490); (5) if it be assumed that section 9 of Article I of the State Constitution prohibits the taxation of pari-mutuel betting by a county, the enabling act did not violate that provision as the permitted tax on admissions was not a tax on pari-mutuel betting; and (6) the enabling act was not a special or local law which required a request therefor by the Board of Supervisors or

a certificate of necessity by the Governor (cf. Robinson v. County of Broome, 276 App. Div. 69, 73, 93 N. Y. S. 2d 662, 665, affd. 301 N. Y. 524, 87 N. Y. S. 2d 501.)

In our opinion, the enabling act and the local law are unconstitutional and invalid Assuming that the Legislature may make distinctions for tax purposes having a rational basis (Ampco P-A Offset Corp. v. City of New York, 14 N. Y. 2d 11, 24, 247 N. Y. S. 2d 865, 871, 197 N. E. 2d 285, 289; appeal dismissed 379 U. S. 5, 85 S. Ct. 47, 13 L. Ed. 2d 21), there is no rational basis for a distinction between a tax on running tracks and one on harness tracks. They are both part of a single sport of horse racing. Both types of tracks have been granted financial benefits for the purpose of improvement of facilities so as to increase tax revenues. Under these circumstances, petitioner was denied the equal protection of the laws because the tax on admissions to harness horse race meetings was increased to 30%, while the tax on admissions to running horse race meetings remained at 15%.

BELDOCK, *P. J.*, and HILL, *J.*, concur.

BENJAMIN, *J.*, concurs in the annulment of the determination and granting of the petition, with the following memorandum: In my opinion, petitioner was denied the equal protection of the laws because the tax on admissions to harness horse race meetings in Nassau and Westchester Counties was increased to 30%, whereas the tax on harness horse race meetings in other counties of the State remained at 15%. In addition, it is my opinion that the statute, although general in form, was so limited with restrictions and conditions as to make it in effect a local law and thus was violative of the Home Rules provisions of the State Constitution, without a request therefor by the Board of Supervisors or a certificate of necessity by the Governor

(c.f. Matter of Henneberger, 155 N.Y. 420, 50 N.E. 61, 42 L.R.A. 132; Matter of Mayor, etc. of New York [Elm St.], 246 N.Y. 72, 158 N.E. 24).

BRENNAN and RABIN, *JJ.*, dissent and vote to confirm the determination and to deny the petition, with the following memorandum: We differ with the majority solely on the ground that, in our opinion, the enabling act and the local law are not unconstitutional and invalid. Petitioner was not denied the equal protection of the laws merely because the tax on admissions to harness horse race meetings was increased to 30% while the tax on admissions to running horse race meetings remained at 15%. In matters of taxation, the Legislature has broad powers of classification and, in our opinion, the distinction between the two types of race meetings was not arbitrary and without a reasonable basis (cf. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-529, 79 S.Ct. 437, 3 L.Ed.2d 480; Spatt v. City of New York, 14 A.D.2d 30, 31-32, 218 N.Y.S.2d 409, 410-411, affd. 13 N.Y.2d 618, 240 N.Y.S.2d 605, 191 N.E. 2d 91, appeal dismissed 375 U.S. 394, 84 S.Ct. 451, 11 L.Ed.2d 411). It may reasonably be conceived that the Legislature permitted higher taxes on admissions to harness horse race meetings because those tracks were given substantial benefits, under sections 1 and 2 of the enabling act, which were not afforded running race horse meetings. In our view, petitioner failed to sustain the burden of negativing "every conceivable basis which might support" the legislative classification (cf. Madden v. Com. of Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 732

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR., as COMPTROLLER of NASSAU COUNTY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

MORRIS H. SCHNEIDER,
County Attorney of Nassau County,
Office and Post Office Address,
Nassau County Executive Building,
Mineola, New York 11501.
Attorney for Appellees.

SEYMOUR S. ROSS,
Senior Deputy County Attorney,

JEROME F. MATEDERO,
Deputy County Attorney,

Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 732

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR., as COMPTROLLER of NASSAU COUNTY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, appellees, County of Nassau and Peter P. Rocchio, Sr., as Comptroller of Nassau County, move that the judgment of the Court of Appeals of the State of New York be affirmed on the ground that the questions presented by this appeal are so unsubstantial or well-settled as not to require further argument, or, in the alternative, to dismiss the appeal on the ground that it is not within the jurisdiction of this Court because it does not present a substantial federal question.

Statement

This proceeding was commenced by appellant in the Supreme Court of the State of New York, County of Nassau, pursuant to Article 78 of the New York Civil Practice Law and Rules, to review a determination by appellee Comptroller assessing a deficiency against appellant on account of a county tax imposed upon admissions to the harness race track operated by appellant within the County of Nassau. The proceeding challenged the legality and constitutionality of the local law which imposed the admissions tax (Nassau County Local Law No. 1, 1956) (set forth on page 5 of the Statement as to Jurisdiction) and the enabling act of the New York State Legislature that authorized the adoption of the local law (Laws of 1956, ch.837; cited as McKinney's Unconsolidated Laws, §9502) (set forth on page 4 of the Statement as to Jurisdiction). The proceeding was transferred to the Appellate Division, Second Department, for disposition.

The Appellate Division decision, from which two of the five justices dissented, found the challenged enactments denied petitioner the equal protection of the laws (App. St.J. 17a).* The Court of Appeals reversed the determination of the Appellate Division and found the statutes were not violative of the equal protection of the laws.

The Court of Appeals, in an opinion by Chief Judge Desmond, concurred in by four other judges (App.

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* References are to pages in the appendix bound with the Statement as to Jurisdiction filed by appellant.

St.J. 9a) (the two dissenting judges wrote no opinion), considered and rejected several state constitutional and non-constitutional grounds of alleged invalidity asserted by appellant and disposed of the constitutional issue of equal protection by finding the challenged enactments must be sustained because there are several conceivable bases that justify the particular statutory classification. The opinion of the Court of Appeals is officially reported at 18 N.Y.2d 30 (1966).

This is an appeal from the order of remittitur of the Court of Appeals of the State of New York (App. St.J. 1a) made and entered on June 9, 1966, and from the judgment on remittitur of the Supreme Court, Nassau County, New York (App. St.J. 4a) made and entered on July 6, 1966. Notice of Appeal was filed on September 2, 1966 with the Clerk of the Supreme Court, Nassau County, the court in possession of the record. The Statement as to Jurisdiction made by appellant was served upon the attorney for the appellees on October 28, 1966.

Facts

Appellant is a corporation specially chartered under New York law to operate a harness racing track at Westbury in the County of Nassau, State of New York.

In 1956, the New York State Legislature passed an enabling act authorizing counties and cities adjacent to a city having a population in excess of two million to tax admissions to harness racing meets

conducted within their limits at a rate not in excess of 30% of the admission price (L. 1956, ch.837). Admissions to harness tracks in other areas of the state are subject to a tax not exceeding 15%, as are all "flat" or thoroughbred horse meets throughout the State of New York. There are no thoroughbred tracks in the cities and counties to which the enabling act is applicable.

Nassau County came within the ambit of the act as it is adjacent to the City of New York, a city with over two million in population. Nassau County Local Law No. 1, 1956 imposed the 30% tax on admissions to harness race meetings conducted within Nassau County.

Appellants paid the tax to the County at the 30% rate without protest in every year after passage of the local law in 1956 and paid the tax for the harness meeting covering the period July 30, 1964, to September 28, 1964, except that petitioner withheld $8,695.46, solely for the purpose of testing the validity of the tax.

Pursuant to statute, appellant requested—and was granted—a hearing before the Nassau County Comptroller then in office to redetermine the tax. Concluding that he had no jurisdiction to determine the constitutional question, the Comptroller adhered to his previous determination of a tax deficiency, whereupon this proceeding pursuant to Article 78 to declare the statutes invalid was commenced.

The petition commencing this proceeding challenged the validity of the statutes on several state constitutional and other non-federal grounds, as well as the equal protection clause of the New York State and

Federal Constitutions. All of the non-constitutional grounds and state constitutional grounds (other than equal protection) urged by appellant were rejected by the Appellate Division and the Court of Appeals. In addition, the Court of Appeals found appellant was not denied the equal protection of the laws and upheld the constitutional validity of the statutes. A motion thereafter made by appellant in the Court of Appeals to recall and amend the remittitur so as to recite the constitutional question raised was denied on the ground that amendment was unnecessary since the court had discussed and passed upon the federal constitutional question in its opinion.

ARGUMENT

The classification made by the State Legislature permitting a city or county adjacent to a city having a population in excess of two million to impose a tax on admissions to harness racetracks not to exceed 30% of the admission price was reasonable and is not violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution merely because harness racetracks in other areas of the state and thoroughbred racetracks may be subject to a local admissions tax not to exceed 15% of the admission price.

The sole issue raised here is the reasonableness of a classification contained in a state tax statute under the equal protection clause. This issue in various contexts has been considered by this Court on numerous occasions and the criteria established by the applicable

law requires a finding that the classification contained in the enabling act in the instant case meets the constitutional requirements of the Fourteenth Amendment. *E.g., Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522 (1959); *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495 (1937); *People ex rel. Hatch* v. *Reardon,* 204 U.S. 152 (1907); *Ampco Print-Advs. Corp.* v. *City of New York,* 14 N.Y.2d 11 (1964), *appeal dismissed,* 379 U.S. 5. Indeed, this Court has stated that "in taxation there is a broader power of classification than in some other exercise of legislation." *Citizens' Telephone Co. v. Fuller,* 229 U.S. 322, 329 (1913).

This Court will dismiss the appeal and decline to review the state court's determination sustaining the constitutional validity of a state statute where the alleged denial of equal protection of the laws is unsubstantial or contrary to the law established by prior decisions of the Court. *Palmer Oil Corp.* v. *Amerado Petroleum Corp.,* 343 U.S. 390 (1952); *Congress of Industrial Organizations* v. *McAdory,* 325 U.S. 472 (1944).

The burden which the law imposes on litigants who would invoke the equal protection clause of the Fourteenth Amendment to overthrow state legislation is most heavy and exacting. To succeed, a petitioner is required to negate "every conceivable basis which might support [the legislative classification]." *Madden* v. *Kentucky,* 309 U.S. 83, 88 (1940). Appellant has failed to meet this burden in the court below or in the Statement as to Jurisdiction in this Court.

The state legislature enjoys wide latitude and discretion in choosing who shall bear the tax burden and

may treat different classes of persons in different ways. *E.g., Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 526-7 (1959) and cases cited therein; *Louisville Gas and Electric Company* v. *Coleman,* 277 U.S. 32, 37 (1928); *People ex rel. Hatch* v. *Reardon,* 184 N.Y. 431, 435 (1906), *aff'd,* 204 U.S. 152 (1909); *Ohio Oil Co.* v. *Conway,* 281 U.S. 146, 159 (1929).

The equal protection clause is not violated merely because a particular class is selected for taxation or unequal treatment is afforded different classes of taxpayers. *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495 (1937).

Nor does the equal protection clause forbid selection for taxation of one class within any designated category while leaving untaxed, or taxed at a different rate, other classes within the same category. *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245 (1922) (tax placed on anthracite coal mines but not on bituminous mines); *Magnano Co.* v. *Hamilton,* 292 U.S. 40 (1934) (tax on oleomargarine at different rate than tax on butter).

The sole constitutional requirement is that the tax discrimination be founded upon a reasonable distinction, or a difference in state policy. "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573 (1910). See also, *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959); *American Sugar Ref. Co.* v. *Louisiana,* 179 U.S. 89 (1900).

It has long been settled by this Court that a state statutory classification, although discriminatory, "is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959), citing, *inter alia, Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61 (1911).

State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961). The legislative purpose need not be known with certainty. *Southwestern Oil Co.* v. *Texas,* 217 U.S. 114, 126 (1909).

The differences justifying inequal statutory treatment need not be great. *State Board of Tax Commissioners of Indiana* v. *Jackson,* 283 U.S. 527, 538 (1930). Indeed, the classification, in order to be unconstitutional, must be palpably arbitrary. See *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 527, 529 (1959).

The sole issue raised here is whether there is any conceivable justification for the particular statutory classification.

The Court of Appeals conceived of several reasons to justify the different tax treatment of harness tracks in the areas of the state covered by the enabling act. In discussing conceivable justification for the particular statutory classification, the Court of Appeals noted that:

"For instance, harness racing is generally carried on at night and flat racing in the daytime. The Legislature could have come to the conclusion that night operations result in greater municipal costs than those in the daytime. Then, too, the harness racing tracks subject to the 30% authorization are in Nassau and Westchester Counties where there is little public transport and very large attendance and these tracks might be thought to require expenditure by the localities of larger amounts for highways. It can be judicially noticed and appears from official statistics that the two harness tracks which could be affected by these two increased admissions tax are in the heavily populated metropolitan area, again justifying the conclusion that local government would be put to greater expense thereby than would be the case in rural areas." App. St.J. 15a.

In addition, the Court of Appeals recognized the long established state policy of separate treatment for harness and thoroughbred racing. A classification based on a difference in state policy supports the conclusion that appellant was not denied equal protection of the law. *E.g., Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959); *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573 (1910); *American Sugar Ref. Co.* v. *Louisiana,* 179 U.S. 89 (1900). As the Court of Appeals concluded, after describing examples of distinctive treatment accorded flat tracks and harness tracks by the legislature over a long period (App. St.J. 12a-13a):

"It is thus apparent that the Legislature, for whatever reason, has consistently and over a

period of years put these two kinds of racetracks into different classifications for purposes of control and taxation." App. St.J. 13a.

Appellant has failed to satisfy its burden of negativing every conceivable basis which might support the tax classification. Appellant's inadequate response to the several conceivable bases noted by the court below is that there is no evidence in the record to support the reasons conceived by the Court of Appeals to justify the classification. Statement as to Jurisdiction, pages 12-13. This principal argument of appellant misconceives the law in this area established by this Court.

There is no requirement that the possible underlying rationale for legislative classification be supported by evidence in the record. A legislative distinction is not arbitrary "if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed." *Rast* v. *Van Deman & Lewis,* 240 U.S. 342, 357 (1916). Moreover, "it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of reasonable strength." *Ibid.* See also, *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959).

As this Court has appropriately noted, when a legislature adopts a tax statute "courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable bases for its action." *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495, 510 (1937). See also, *Madden* v. *Kentucky,* 309 U.S. 83, 88 (1940).

Conclusion

For the foregoing reasons, the appeal should be dismissed, or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

MORRIS H. SCHNEIDER,
County Attorney of Nassau County,
Attorney for Appellees.

SEYMOUR S. ROSS,
Senior Deputy County Attorney,

JEROME F. MATEDERO,
Deputy County Attorney,

Of Counsel.

November 23, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 732

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR., as COMPTROLLER OF NASSAU COUNTY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney *Pro Se*
Appearing pursuant to
New York Executive Law, § 71.

DANIEL M. COHEN
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the revised rules of this Court the Attorney General of the State of New York moves that the judgment of the Court of Appeals of the State of New York be affirmed on the ground that the questions presented by this appeal are so unsubstantial or well-settled as not to require further argument, or, in the alternative, to dismiss the appeal on the ground that it is not within the jurisdiction of this Court because it does not present a substantial federal question.

Statement

The Attorney General joins in the motion made by the appellees to dismiss the above numbered appeal taken by the appellant, Roosevelt Raceway. The Attorney General,

to avoid repetition, supports completely the position taken in the motion papers dated November 23, 1966 filed with this Court by the appellees. Further support of that position, particularly with reference to the holding herein (App. St. Jur., 14a, 15a) that there is a long-established state policy in New York to separate treatment for harness and thoroughbred racing, is to be found in the similar prior holding in *Matter of Murtha* v. *Monaghan,* 1 A. D. 2d 178, 180, 181 (1st Dept., 1956), aff'd 2 N. Y. 2d 819 (1957), reargt. den. and remittitur amended 3 N. Y. 2d 880 (1957), cert. den. 355 U. S. 891 (1957).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or in the alternative, the judgment below should be affirmed.

Dated: New York, New York, November 28, 1966.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney *Pro Se,*
Appearing pursuant to New York
Executive Law, § 71.

DANIEL M. COHEN
Assistant Attorney General
of Counsel

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

GEORGE MORTON LEVY,
Counsel for Appellant.

Of Counsel:
GEORGE MORTON LEVY,
LOUIS HAIMOFF.

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Grounds of Jurisdiction

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(2) on the ground that the judgment appealed from sustained the validity of a state statute claimed to violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals denied appellant's motion to amend the remittitur to set forth the federal question "as unnecessary since the Federal constitutional question is discussed and passed upon in the opinion of the Court of Appeals" [*Application of Roosevelt Raceway, Inc., etc.* v. *County of Nassau, et al.*, 18 N.Y. 2d 720 (Sept. 22, 1966)].

Opinions Delivered in the Courts Below

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, is reported at 25 A.D. 2d 595, 267 N.Y.S. 2d 591 (p. 17a).*

The opinion of the Court of Appeals of the State of New York is reported at 18 N.Y. 2d 30, 271 N.Y.S. 2d 662 (p. 9a).

Order and Judgment Appealed From

The appeal is from the order of remittitur of the Court of Appeals entered June 9, 1966 (p. 1a) and the judgment on remittitur, entered July 6, 1966 (p. 4a). Notice of appeal was filed on September 2, 1966 with the Clerk of the Supreme Court, Nassau County (p. 3).

The Statutes Involved

The challenged enactments are the enabling act of the Legislature of the State of New York, which authorized "cities or counties adjacent to a city having a population in excess of 2,000,000" to collect a 30% admission tax on admissions to harness tracks within such cities or counties; and the Local Law adopted by Nassau County pursuant to such enabling act.

The enabling act is Chapter 837, Section 3, of the Laws of 1956, set forth in 65 McKinney's Consolidated Laws of New York 499 (cited as *McK. Unconsol. Laws* § 9502).

The local law is Nassau County Local Law No. 1, 1956, which amended § 4-2.1 of the Nassau County Administrative Code by increasing from 15% to 30% the rate of the County admissions tax imposed on appellant.

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* References are to pages of the Appendix to the Statement as to Jurisdiction filed by appellant.

The text of both laws is set out in the Statement as to Jurisdiction heretofore filed (pp. 4-6).

Question Presented

The question is whether appellant Roosevelt Raceway, a harness racing track in Nassau County, is denied the equal protection of the laws by a state statute which authorized Nassau County to impose a 30% admissions tax on harness tracks, while the admissions tax on thoroughbred tracks in the same county and in neighboring Queens County was fixed at 15% (*L. 1956, c. 837; L. 1952, c. 236*).

Gist of the Argument

We contend, as three of the five Judges of the New York Appellate Division held, that "There is no rational basis for a distinction between a tax on running tracks and one on harness tracks" (p. 19a). Two of the seven Judges of the Court of Appeals agreed (p. 16a).

Chief Judge Desmond of the Court of Appeals, writing for the majority, acknowledged that "We do not know what prompted the Legislature to permit a 30% impost on harness tracks only" (pp. 14a, 15a), but nevertheless found that the differences were sufficiently "substantial" to justify the discriminatory tax (p. 15a).

We submit that the classification is arbitrary on its face, that the differences relied upon are either nonexistent or irrelevant; and constitute mere "fanciful conjecture" wholly insufficient "to repel attack" (*Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 209).

The Alleged Tax Deficiency

In 1964, the petitioner filed its tax return in Nassau County, setting forth that for the period from July 30, 1964 to September 28, 1964, the admission tax payable to Nassau County under the challenged enactment amounted to $559,353.06; that there had been paid $550,657.60; that the taxes theretofore paid had been paid under protest; and that petitioner claimed that the tax in its entirety was unconstitutional and invalid. It was also stated that the petitioner proposed "to test the validity of such admission tax in a court of competent jurisdiction".

Thereafter, and on October 15, 1964, the Comptroller notified petitioner of an alleged deficiency in the sum of $8,695.46; within 30 days thereafter, petitioner filed its protest against the deficiency; hearings were held on December 1 and 16, 1964; a determination was made rejecting the protest on December 30, 1964; and within 90 days thereafter, petitioner instituted the present proceeding as required by the Nassau County Administrative Code, Section 4-2.7.

Appellant's petition asserted in Paragraph 25 the repugnance of the admission tax to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

After joinder of issue, the matter was transferred to the Appellate Division, Second Department for determination. The matter was determined upon the pleadings, including the transcript of the hearing before the Comptroller annexed as an exhibit to the petition. The Appellate Division, by order dated February 14, 1966, annulled the Comptroller's determination and granted the petition, on the ground that the enabling act and the local law deprived appellant of the equal protection of the laws, three justices concurring and two dissenting.

Appellees appealed to the Court of Appeals, which reversed the order of the Appellate Division, five judges concurring and two dissenting, holding, with respect to the federal constitutional question, that the enabling act and the local law were not repugnant to the equal protection clause.

History of Local Admission Tax Legislation on Racetracks in New York

When the New York State Constitution was amended in November 1939 to exempt from its prohibition against gambling, pari-mutuel betting on horse racing (Art. I, § 9), the Pari-Mutuel Revenue Act of 1940, which implemented the constitutional authorization, provided for a tax on the pari-mutuel wagering, but specifically prohibited any county from imposing any taxes, including taxes "on admission fees" to the tracks (*L. 1940, c. 254*).

It was not until 1952, that the Legislature authorized cities and counties to impose an admissions tax on both harness and thoroughbred tracks, fixing the maximum at 15% (*L. 1952, c. 148, c. 236*).

In 1956, for no stated reason, the Legislature authorized local governments to impose a 30% tax on admissions to harness tracks located in "cities or counties adjacent to a city having a population in excess of 2,000,000" (*L. 1956, c. 837*), but left unaffected the 15% admissions tax on all other harness tracks, as well as on all running tracks anywhere in the State, including Aqueduct and Belmont Park in the metropolitan New York area.

We submit that this 30% tax on harness tracks in Nassau and Westchester Counties, while neighboring flat tracks enjoy a 15% rate, is palpably discriminatory and denies appellant the equal protection of the laws.

POINT I

A tax which discriminates against harness tracks in favor of running tracks in the same metropolitan area is arbitrary and denies the harness tracks the equal protection of the laws in violation of the Constitution of the United States.

We contend that a tax classification which discriminates against harness tracks in favor of thoroughbred tracks in the same urban area is palpably arbitrary and that no state of facts can be shown or conceived which would justify this onerous admission tax differential against harness racing.

Both types of enterprise conduct horse races with pari-mutuel betting. Both enterprises were authorized by the same provisions of the New York State Constitution (Article I, § 9). Both forms of racing are under the Pari-Mutuel Revenue Law (McK. Unconsol. Laws, §§ 7951-8052). The only factual differences between the two forms of racing are wholly unrelated to the subject or purpose of the challenged enactment, *viz.*:

(a) The jockey in a running horse race sits astride the horse while the driver in a harness race sits in a sulky; and

(b) The gait of the horse is different.

There is nothing in the gait of the horse or the position of the driver or jockey which suggests, however remotely or speculatively, any rational basis for allowing a state subdivision to tax up to thirty percent of admissions to harness races, but only fifteen percent of admissions to running races. The distinction is on its face arbitrary and discriminatory since it fails to treat equally enterprises "similarly circumstanced" (*Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 37).

At the hearing before the Comptroller of Nassau County upon which the determination reviewed herein was made,

ample opportunity was afforded the County of Nassau to justify either by fact or logic the discrimination between flat tracks and harness tracks in Nassau County. In that hearing, not one shred of evidence or argument, however fanciful or conjectural, was offered to justify the "classification." On the contrary, the testimony of Edward Larkin, Presiding Supervisor of the Board of Supervisors of Nassau County, exposed the arbitrary nature of the discrimination. Larkin said:

> "I don't think or I don't know how you can make a distinction between a horse that runs with that thing behind it, a sulky, and a horse that runs without it."

Larkin admitted that the 15% admission tax imposed by Nassau County on the thoroughbred track at Belmont Park did not "come under discussion at all". No consideration had been given to whether it was unfair to tax Roosevelt Raceway 30% and Belmont Park 15%. Larkin said:

> "To my knowledge there was no discussion, there was no comparison made of the relative merits of either one or the other. It was a situation where the Legislature had given permission for an act to be taken. The act was being beneficial to the finances of the County and the act was therefore taken."

The presumption of constitutionality which must be accorded any legislative enactment is thus overcome by the obvious lack of the remotest rational connection between admission taxes on the one hand and the position of the jockey or driver and the gait of the horse on the other.

Apt here is the language of the Court of Appeals in *People ex rel. Hatch* v. *Reardon,* 184 N.Y. 431, per Vann, J., at p. 445:

> " * * * While a tax upon * * * the * * * horses of a particular man, or on the sale thereof, would obvi-

> ously invade a constitutional right, still a tax upon * * * all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the legislature. This is true of a tax * * * on *all* race-horses. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs. (Matter of McPherson, 104 N.Y. 306, 318; Matter of Gould, 156 N.Y. 423, 427.)" (emphasis added)

Here, all race horses have not been "treated alike"; a distinction has been made between thoroughbred horses and standardbred horses, though it is not possible even to conjecture a rational relation between admission taxes and the breed or gait of the horse or the position of the rider. As was pointed out by track counsel during the hearings before the Nassau County Comptroller, "you might as well tax white horses at 15% and black horses at 30%".

In *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194, the Supreme Court emphasized that the presumption of constitutionality is a rebuttable presumption of fact, which may be overcome by the patent arbitrariness of the statute. The Court said (pp. 209, 210):

> "Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption * * * It is not a conclusive presumption or a rule of law which makes legislative action invulnerable to constitutional assault. *Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack.*" (emphasis added)

In this case, where the arbitrariness appears on the face of the enabling act, and no factual data or logical argument has been shown or can be conceived tending

to support the legislative classification, the presumption of constitutionality is rebutted. As was held in *Smith* v. *Cahoon*, 283 U.S. 553, where the Supreme Court struck down a Florida statute which regulated "auto transportation companies," but exempted transporters of agricultural, horticultural, dairy and seafood products (at pp. 566-567):

> "The principle that the state has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this court * * * But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities." [citing cases].

Here, a 30% tax is imposed on admissions to harness tracks and a 15% tax on admissions to thoroughbred tracks, though no rational justification for the discrimination has been shown or can be suggested. The "differences" in the position of the jockey or driver or the gait of the horse palpably do not constitute "pertinent and real differences, as distinguished from irrelevant and artificial ones." (*Merchants Refrigerating Co.* v. *Taylor*, 275 N.Y. 113, 121-122).

That there is no "pertinent difference" between the two types of horse racing is confirmed by the fact that the Legislature has historically dealt with thoroughbred racing and harness horse racing as a single sport, *viz.*, horse racing.

The Racing Law, originally enacted in 1895 (*L. 1895, c. 570*), governed both running and trotting racing; provided for the organization of corporations "for the purpose of raising and breeding and improving the breed of horses" (Sec. 1); authorized any such corporation "to hold one or more *trotting or running* race meetings in each year" (Sec. 3); and permitted trotting associations "entitled to

conduct trotting races * * * (to) also conduct running races'' (Sec. 9).

Thus, the Racing Law since 1895 treated running and trotting race meetings as a single sport of horse racing and this classification continued without interruption until the advent of pari-mutuel betting in 1940, when both forms of horse racing were covered by the same Pari-mutuel Revenue Law (*L. 1940, c. 254*).

We recognize, as did the New York Court of Appeals, that the question is whether there is ''any conceivable justification for this particular statutory classification'' (p. 14a). We submit, however, that the factual ''differences'' relied upon by the Court of Appeals in sustaining the statute are not only irrelevant but actually non-existent. We consider *seriatim* the justifications ''conceived'' to be sufficient by the Court of Appeals (p. 15a):

(a) ''For instance, harness racing is generally carried on at night and flat racing in the daytime. The Legislature could have come to the conclusion that night operations result in greater municipal costs than those in the daytime.''

We are at a loss to imagine what these greater municipal expenses might be. The Court below did not specify. The difference between a day and night operation is artificial illumination—but the track, not the county, furnishes the illumination.

It might be fancifully conjectured that the county is required to furnish more traffic police or other security protection at night than during the day. But the incontrovertible fact is that Nassau County furnishes no police, traffic or otherwise, to Roosevelt Raceway. Traffic and security are supervised by track personnel—surely, an onerous tax discrimination ought not to be sustained by a hypothetical supposition unsupported by the record and contrary to facts which are a matter of public record in Nassau County.

(b) Chief Judge Desmond said further (p. 15a):

> "Then, too, the harness racing tracks, subject to the 30% authorization are in Nassau and Westchester Counties where there is little public transport and very large attendance and these tracks might be thought to require expenditure by the localities of larger amounts for highways. It can be judicially noticed and appears from official statistics that the two harness tracks which could be affected by these two increased admissions tax are in the heavily populated metropolitan area, again justifying the conclusion that local government would be put to greater expense thereby than would be the case in rural areas."

But Belmont Park is also in Nassau County, where "there is little public transport and very large attendance"; and both Belmont Park and Aqueduct are also in the same "heavily populated metropolitan area".

Moreover, there is nothing to suggest either on the basis of fact or logic that "public transport" requires "expenditures by the localities" of lesser sums than is expended "for highways". What reason is there to suppose that the City of New York expended less in acquiring the New York City transit system than is expended by Nassau County or Westchester County for highways and it is common knowledge that most of the funds employed in highway construction is supplied by the federal government.

(c) In conclusion, Chief Judge Desmond said (p. 15a):

> "We will never know what in fact moved the Legislature but we cannot say there is nothing in the local governmental legislation and management of a harness racing track adjacent to the metropolitan area, which is sufficiently different from running tracks elsewhere in the State, to warrant an authorization by the Legislature for the enactment of a different tax on admissions on these particular harness tracks."

With all due respect, we suggest that the Court of Appeals, in this respect, fell into inadvertent error. The statute does not classify metropolitan harness tracks differently "from running tracks *elsewhere* in the state"—on the contrary, it is the vice of the classification complained of that it discriminates against harness tracks in favor of running tracks in precisely the same urban area.

(d) The Court below noted "that the (New York) Legislature in many other statutes has ordered different treatment for 'flat tracks' and harness tracks" (p. 12a). Reference was made to the different Racing Commissions which govern the respective sports; and it was pointed out that the tax on pari-mutuel betting is "at a (different) rate and formula"; and that differing statutory procedures for providing "financial assistance • • • for modernization of track facilities" were enacted (pp. 12a, 13a).

Of course, there are "differences" between trotting tracks and running tracks which warrant differences in *regulatory* legislation. But it is horn-book constitutional law that the "difference" must bear "a reasonable and just relation" to the specific classification in question (*Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 37). Thus, when different Commissions are created to govern the two tracks, this is because the racing rules differ; and when the Legislature levies a graduated pari-mutuel tax on *harness* tracks, ranging from 5% on betting up to $175,000 to 11% on betting over $600,000; or imposes a 10% tax on metropolitan *running* tracks and a 9% tax at Saratoga, the classifications are rationally related to the volume of betting, not to the position of the jockey or driver. Further, in actual application to the metropolitan tracks, based upon existing volume of betting, the pari-mutuel tax on harness and flat tracks is substantially the same.

Similarly, the differences in the legislation enacted to enable the tracks to modernize their facilities are not "a

ground of difference having a fair and substantial relation" to the admissions tax rate (*Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527). Varying legislative patterns facilitating new track construction are not relevant to the "object" of admission taxes which "is to secure revenue" (*Colgate* v. *Harvey*, 296 U.S. 404, 424).

But in any event, and decisive on this issue, is the fact, demonstrable to a mathematical certainty, that the benefits granted the running tracks have far exceeded those conferred on the harness tracks. If anything, this would justify a higher tax on the running tracks—not on the harness tracks. As is shown by official statistics, the legislature granted the running tracks a reduction in the parimutuel tax which amounted to more than $100,000,000, and is still continuing, as compared with the total of $40,019,706.67 allowed the harness tracks under a statute now repealed (L. 1959, Ex. Sess. c. 881, § 7).

The net is, to paraphrase the language of Chief Judge Desmond, that the reason "We do not know what in fact moved the Legislature" to discriminate between running tracks and neighboring harness tracks is because there was in fact no reason, other than political expedience, a consideration which is no more sufficient here than the political maneuvering which prompted the legislative "gerrymandering" struck down under the "one man, one vote" rule (see *Baker* v. *Carr*, 369 U.S. 186).

Authorities Relied Upon Below Are Inapposite

We submit that the authorities relied upon by the Court below and by appellees are either inapposite or tend to establish the invalidity of the discriminatory tax here imposed.

State Board of Tax Commissions v. *Jackson*, 283 U.S. 527, cited by the Court below, sustained the validity of a retail store license tax which provided for a graduated levy

ranging from $3. per store to $25. for each store in excess of 20. The Court ruled that "The chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities" (p. 535). Here, harness tracks have no "advantages" over running tracks—if anything, the economic advantage is the other way.

In *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, relied upon below, the statute under attack authorized a tax on anthracite but not bituminous coal. The classification was sustained specifically because anthracite had "no substantial use beyond a fuel", whereas bituminous "has other uses", which were "incentives to industry that the state, in natural policy, might well hesitate to obstruct or burden"; this "fact is not denied and the products are enumerated" (p. 257); accordingly, the "distinction" had "logical and legal justification" and was therefore "not unreasonable or arbitrary" (p. 257). Here, so far as the state is concerned, pari-mutuel betting on running tracks has no different use or function than pari-mutuel betting on harness tracks. Both are designed to provide revenue to governments, local and state—neither has any other "use".

Magnano Co. v. *Hamilton*, 292 U.S. 40, cited by the Court of Appeals, held that a tax on oleomargarine, not imposed upon butter, did not violate the equal protection clause because "it is obvious that the differences between butter and oleomargarine are sufficient to justify their separate classification for purposes of taxation" (p. 43). It is well settled that the lawmakers may levy taxes which restrict or even destroy particular occupations or businesses where such action is deemed appropriate in the public interest, which policy considerations were plainly applicable to oleomargarine as compared with butter. (*Magnano Co.* v. *Hamilton, supra*, p. 44).

Here, there is no intimation of any legislative purpose either to restrict or destroy harness tracks or to favor running tracks over harness tracks.

On the contrary, the course of State legislation has been to enlarge greatly the number of racing days for both flat and harness racing and to make comparable provision for the modernization of track facilities in order to encourage increased betting and augmented state revenues.

The basic constitutional doctrine is that "mere difference is not enough" (*Merchants Refrigerating Co.* v. *Taylor*, 275 N.Y. 113, 122); and that the difference must be "pertinent" to the specific classification adopted.

Here, there is no "pertinent" distinction. Both harness and running tracks are, for governmental purposes designed, euphemistically, to accomplish "improvement of the breed of *horses*"; and, realistically, to provide the means for pari-mutuel betting from which, as the Constitution mandates, the State shall "derive a reasonable revenue for the support of government" (Art. I, § 9).

To adopt a current colloquialism, the "name of the game" in horse racing is revenue. In this context, pari-mutuel betting on harness racing and flat racing is the same. We have shown that the differences referred to by the Court of Appeals are either factually incorrect or irrelevant. The gait of the horse and the position of the rider certainly do not warrant tax discrimination. We submit that the Presiding Supervisor of the County of Nassau, the dissenting Judges in the Appellate Division, and the majority in the Court of Appeals have all "conspicuously failed" to find any "reasonable basis" to discriminate against harness tracks in favor of flat tracks (*Hartford S.B.I. & Ins. Co.* v. *Harrison*, 301 U.S. 458, 463). Broad as is the power of government to classify for tax purposes, "there is a point beyond which the State cannot go without violating the Equal Protection Clause"—the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" (*Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527).

We submit that in imposing a 30% tax upon harness tracks, while taxing "next door" running tracks at 15%, the challenged legislation has passed the "point beyond which the State cannot go".

CONCLUSION

For the foregoing reasons, the motion of appellees should be denied in all respects.

Respectfully submitted,

GEORGE MORTON LEVY,
Counsel for Appellant.

Of Counsel:
GEORGE MORTON LEVY,
LOUIS HAIMOFF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 732

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR.
as COMPTROLLER of NASSAU COUNTY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

REPLY BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

MORRIS H. SCHNEIDER,
County Attorney of Nassau County,
Office and Post Office Address,
Nassau County Executive Building,
Mineola, New York 11501.
Attorney for Appellees.

SEYMOUR S. ROSS,
Senior Deputy County Attorney,
JEROME F. MATEDERO,
Deputy County Attorney,
Of Counsel.

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COUNTY OF NASSAU and PETER P. ROCCHIO, SR.,
as COMPTROLLER of NASSAU COUNTY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

REPLY BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Statement

This reply brief is deemed necessary in order to show that appellant has failed to demonstrate that the challenged state statute is violative of the equal protection clause and to set forth additional reasons, not contained in the opinion of the court below and not considered by appellant, which support appellees' contention that the different local admissions tax treatment accorded harness and thoroughbred tracks by the State Legislature is constitutionally valid.

Summary of Argument in Reply

Appellant, Roosevelt Raceway, Inc., does not disagree with the basic legal principles applicable here. It concedes that if there is *any* conceivable justification for the legislative classification, it must be upheld as constitutionally valid and not violative of the equal protection clause. Appellant's Brief, p. 10.* That the different tax treatment is not discriminatory if based upon a reasonable distinction or a difference in state policy is equally indisputable. *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959); *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573 (1910); *American Sugar Ref. Co.* v. *Louisiana,* 179 U.S. 89 (1900).

However, appellant misconceives the burden imposed by law where a tax classification is challenged. Thus, it is futile for appellant to take to task appellees for offering "not one shred of evidence or argument . . . to justify the 'classification' ". Appellant's Brief, p. 7. The burden is not upon the appellees to produce evidence to support the classification or to offer a logical explanation of what prompted the Legislature to permit the distinctive tax treatment for admissions to the two types of sport. Rather, the burden here is upon appellant (petitioner in the courts below) *to negate "every conceivable basis* which might support [the legislative classification]" (*Madden* v. *Kentucky,* 309 U.S. 83, 88 [1940]) (emphasis supplied), and if any state of facts can be so conceived, "the existence of that state of facts at the time the law was enacted must be assumed" (*Rast* v. *Van Deman & Lewis Co.,* 240 U.S. 342, 357 [1915]). Moreover, it is of no significance "that the facts may be disputed or their effect opposed by argument and opinion of reasonable strength." *Ibid.* See also, *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522, 528 (1959).

Appellant has failed to sustain its burden. The only distinctions between the two types of races that appellant concedes is that the gait of the horse and position of the

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* Reference is to "Brief of Appellant in Opposition to Motion to Dismiss or Affirm."

jockey differ. Appellant's Brief, pp. 6, 7, 8, 9, 12, 15. Despite appellant's preoccupation with, and reiteration of, such obvious and immaterial distinctions, it is noted that at no time have appellees urged that such distinctions are significant to support the separate tax classification for harness and thoroughbred tracks. Other differences, however, which do provide a reasonable basis for the classification, have not been adequately explained away by appellant. Any one of the differences noted by the court below or relied upon by appellees is adequate to support a distinction for tax purposes. Such differences, for example, are: (1) the nighttime operation of harness tracks as compared to the daytime operation of thoroughbred tracks; (2) the proximity of the harness tracks to New York City; (3) the profit-making character of harness tracks versus the non-profit thoroughbred sport; and (4) the longer racing season permitted for harness tracks than for thoroughbred tracks.

In reply, appellees will discuss appellant's failure satisfactorily to negate the distinctions noted in the opinion of the Court of Appeals and will set forth additional reasonable bases previously raised that support the classification but that were ignored by appellant on this motion.

I. Appellant has not met its burden of negating every conceivable distinction which supports the tax classification.

Appellant unsuccessfully attempts to demonstrate that the differences found by the court below to justify the tax classification were not significant or substantial. The materiality of these differences and the significance of the long-standing legislative practice of separate treatment for harness and thoroughbred tracks are discussed below.

A. THE NIGHTTIME OPERATION OF HARNESS RACING.

Appellant, for example, is "at a loss to imagine what . . . greater municipal expenses might be" involved because harness racing is permitted to operate only at night while

thoroughbred racing may take place only in the daytime and urges that it would be only fanciful conjecture to say the County furnishes more police traffic and security protection at night than during the day. Appellant's Brief, p. 10.

But, whether the cost of providing the same municipal services will be more expensive in the evening than during the daytime, or whether additional municipal services are required in the evening, or even whether such services are, in fact, provided at all, is not the principal consideration. The only relevant question is whether the Legislature reasonably could have conceived that such services might be required and that additional expenses might be incurred. That police services such as, for example, traffic control and investigations of crimes, are more expensive in the evening seems a reasonable proposition. If the court below concluded that the Legislature could have come to the conclusion that night operations might result in greater municipal costs than daytime operations, could not then the Legislature itself have reached the same conclusion? Statement as to Jurisdiction, p. 15a. That such distinction is adequate support for the classification seems obvious.

Moreover, the bald unsupported statement that "Nassau County furnishes no police, traffic or otherwise, to Roosevelt Raceway" (Appellant's Brief, p. 10) is not correct. The County does provide additional police for traffic control in the vicinity of the track during the racing season and supplies from time to time other police services at the track itself.

B. The Harness Tracks' Proximity To New York City.

The harness tracks affected by the enabling act and located in Nassau and Westchester Counties lack the vast public and private transportation facilities which are available to the thoroughbred tracks located in New York City (Aqueduct Racetrack) and on the boundary between Nassau and New York City (Belmont Racetrack).

A large number of the patrons of thoroughbred races in New York City come to the tracks via the City's mass

transportation network, such as the subway and railroad. But the situation is not the same for the harness tracks which are in suburban areas and are only accessible by highways. Thus, it may be conceived that Nassau County might be required to provide additional highway facilities and expend greater sums for road improvement and highway maintenance than is required to provide access to the thoroughbred tracks in New York City.

The Legislature, in authorizing a higher admissions tax, could reasonably have anticipated greater costs and expenditures by the suburban municipalities affected to provide access to the harness tracks than is required for the thoroughbred tracks in New York City. It could reasonably be conceived that Nassau County, for example, would be obliged to expend larger sums of money than New York City for road improvements, since the thoroughbred tracks in the City, including Belmont Track, which is partially in Nassau County, were already located on major arteries and could also be reached directly by means of public and private rail transportation. And, in fact, Nassau County did spend substantial sums to widen highways adjacent to appellant's track in order to accommodate the large attendance resulting particularly from the modernization of appellant's facilities with state financial assistance.

The Legislature could reasonably have concluded in 1956, when it granted financial assistance to appellant to rebuild, expand and modernize its track facilities, that Nassau County would be required to expend substantial sums for highway improvements and continuing maintenance. The permission to increase the admissions tax rate to harness tracks was granted to Nassau County in the very same statute that provided state financial aid to appellant's track to modernize its facilities.

It is not incumbent upon the Legislature to weigh in detail the comparative financial requirements and resources of the localities affected by the different types of tracks. In any event, the Legislature may have considered that modernization of the thoroughbred tracks in the City would not impose relatively as large expenditures upon

New York City, primarily because of the existence of adequate highways and availability of public and private rail transportation.

C. New York Has Long Recognized the Significant Distinctions Between Harness and Thoroughbred Tracks by Consistently Placing the Two Types of Racing in Separate Classifications for Purposes of Both Taxation and Regulation.

The court below noted the long-established state policy, reflected in the consistent practice of the Legislature, of according harness and thoroughbred racing distinctive treatment not only in regulatory legislation but in tax matters as well. Statement as to Jurisdiction, pp. 12a-13a. The long history of the different statutory treatment is well documented in *Matter of Murtha* v. *Monaghan*, 1 A. D. 2d 178, 148 N. Y. S. 2d 615 (1st Dept. 1956), *aff'd*, 2 N. Y. 2d 819 (1957), *reargument denied and remittitur amended*, 3 N. Y. 2d 880, *cert. denied*, 355 U. S. 891 (1957).

In matters of taxation, the State, for example, levies a tax on pari-mutuel betting at harness tracks at a different rate than on thoroughbred tracks. Compare L. 1940, ch. 254, as amended, §§9 and 9-a with §45, McK. Unconsol. Laws, §§7959, 7960, 8019. Despite appellant's attempt to rationalize this favorable tax treatment on the basis of the volume of betting at the different tracks (Appellant's Brief, p. 12), the simple answer is that the percentage of the betting pool taken by the State at the different tracks will differ, as will the portion of the pool retained by the tracks. And why is a distinction for one tax permissible and for another tax not proper if, as appellant urges, there is no difference in the two sports to support a different classification for tax purposes? In any case, the pari-mutuel tax provides an example where the State has treated the two types of tracks as being in separate categories for tax purposes.

Another distinction in treatment was made by the Legislature in providing different financial assistance in separate statutes to each type of track for modernization of facilities. Compare L. 1956, ch. 837, with L. 1955, ch. 813, and L. 1957, ch. 355, McK. Unconsol. Laws, §§7954, 7959, 7960, 7972. The Legislature was persuaded to provide state financial assistance with the understanding that greater patronage would result in a corresponding increase in tax revenue for the state. A direct result of this modernization of harness facilities was, of course, increased revenues for the harness tracks. While the thoroughbred tracks received substantially more than the $40,019,706.67 of state financial aid allowed the profit-making harness tracks, including appellant's track, it does not follow, as appellant urges, that the rate of admissions tax should bear a relationship to the state financial assistance. Appellant's Brief, p. 13.

Moreover, it was the same statute which provided financial assistance to appellant to expand and modernize its track that contained the increase in the permissible local admissions tax rate. It certainly might reasonably have been anticipated that the enlarged facilities would require substantial additional local expenditures.

II. Additional reasons, not discussed in the opinion of the court below, provide a reasonable basis to support the different admissions tax treatment accorded harness and thoroughbred tracks.

In appellees' brief in the court below, several additional reasons were expressed to support the tax classification made by the Legislature. Since the court below indicated the legislative motive in establishing the classification was not known, it stated only some examples or instances that are reasonable justification for the statutory classification. The instances cited by the court below were by no means exhaustive. Some additional reasons that support the classification are now discussed.

A. HARNESS TRACKS ARE PRIVATE ENTERPRISES ENGAGED IN BUSINESS FOR PROFIT, WHILE ALL THOROUGHBRED TRACKS ARE OPERATED BY A NON-PROFIT ASSOCIATION; THIS DISTINCTION IS SUFFICIENT REASON FOR THE SEPARATE CLASSIFICATION.

Roosevelt Raceway, Inc., whose economic interests motivated this law suit, is a corporation engaged in business for profit, may earn income and pay dividends to its stockholders. L. 1940, ch. 254, §37, as amended, McK Unconsol. Laws, §8003. All harness tracks in New York State are engaged in business as profit-making enterprises. But thoroughbred tracks are conducted only by a non-profit racing association which is barred by law from paying out or distributing any of the assets of the association "by way of dividend or otherwise."* L. 1926, ch. 440, as amended, McK. Unconsol. Laws, §§7902, 7910.

A race track which may earn a profit and return it to its shareholders is clearly in a separate class from, and a different business than, a non-profit track.

The equal protection clause is not violated because a particular class is selected for taxation or because unequal treatment is accorded different classes of taxpayers, *E.g., Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495 (1937). Nor does the equal protection clause forbid the state to select for taxation one class within a designated category while either leaving untaxed, or taxed at a different rate, other classes within the same category. See *e.g., Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934); *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922). Different businesses may be taxed differently (*State Board of Tax Commissioners* v. *Jackson*, 283 U.S. 527, 537-38 [1930]), and the state "may select or exempt without constitutional limitation whatever business classifications it deems proper." *People ex rel.*

*Although the state statutes permit incorporation of profit corporations as well as non-profit corporations for the purpose of conducting thoroughbred horse race meetings, the only thoroughbred tracks presently in operation are operated by a non-profit association.

Moffett v. *Bates,* 276 App. Div. 38, 39, 93 N.Y.S.2d 313, 315 (3 Dept. 1949), *aff'd.* 301 N.Y. 597 (1950), *cert. denied,* 340 U.S. 865 (1950).

"The power of taxation necessarily involves the right of selection, which is without limitation provided all persons in the same situation are treated alike . . . ." *People ex rel. Hatch* v. *Reardon,* 184 N.Y. 431, 445 (1906), *aff'd,* 204 U.S. 152 (1907). It seems beyond dispute that a business permitted by law to make a profit is not in the same situation, class or category with a non-profit association. See the last paragraph of the opinion of the court in *Ampco Print-Advs. Corp.* v. *City of New York,* 14 N.Y. 2d 11, 25 (1964), *appeal dismissed,* 379 U.S. 5, where there is set forth "a considerable list of tax laws validated by the United States Supreme Court which upheld taxing discriminations as to the justice and reasonableness of which judgments might differ." Statement as to Jurisdiction, p. 14a.

The profit and non-profit dichotomy for purposes of tax classification is not novel. The tax laws of New York and federal tax statutes as well are replete with provisions affording different tax treatment to non-profit enterprises *vis a vis* those operated for private gain. *E.g.,* L. 1947, ch. 278, §1, as amended, McK. Unconsol. Laws, §9451 (e) (granting counties outside of New York City authority to impose admissions taxes but *exempting* certain charitable, educational, religious and *non-profit organizations*) (since repealed by L. 1965, ch. 93, §5); Tax Law, §1230 (*exempting* religious, charitable, educational and certain other *non-profit agencies* from certain taxes by localities authorized pursuant to Tax Law §1201 *et seq.*); Tax Law §1116 (*exempting* religious, charitable, scientific, educational and other *non-profit agencies* from state sales tax); Real Property Tax Law, §§ 420, 490 (*exempting* real property owned by *specified non-profit corporations or associations* from local government real property taxes.)

Among the non-profit organizations exempt from real property taxes in New York under the Real Property Tax Law are: fraternal organizations (§428); theatrical corporations created by Act of Congress (§432); medical societies (§474); medical and dental indemnity and hospital service corporations (§486).

Examples of non-profit organizations exempt from federal income taxes include: agricultural organizations, business leagues, boards of trade, chambers of commerce, civic leagues, clubs, credit unions, community chests, co-operative associations, farmers cooperatives, insurance associations, labor organizations, lodges, pension trusts, real estate boards, and scientific organizations. 26 U.S.C. 3501.

The former federal excise tax on admissions (68A Stat. 497 [1954]) (repealed 79 Stat. 145 [1965]) expressly exempted not only admissions charged by churches, educational institutions, charitable fund and veterans' organizations, but also such non-profit enterprises as agricultural fairs, rodeos, government-operated swimming pools, bathing beaches, skating rinks and other physical exercise facilities, amateur theater performances and certain amateur and semi-professional baseball games. 68A Stat. 498 (1954).

The long history of distinctive tax treatment accorded profit and non-profit ventures supports the conclusion that the profit-making harness tracks are in a different class or category and may be treated differently from the non-profit thoroughbred tracks insofar as the local admissions tax is concerned.

B. A Longer Racing Season is Permitted for Harness Tracks Than for Thoroughbred Tracks.

The Legislature periodically prescribes the length of both the harness racing and thoroughbred racing season in each year. Since 1956, when it first authorized a higher admissions tax for harness racing, the Legislature has consistently permitted a longer racing season for harness meet-

ings in Nassau and Westchester Counties than for thoroughbred meetings in New York City. The harness season is presently approximately forty-nine weeks each year, while thoroughbred meetings are limited to approximately thirty-seven weeks.

It is reasonable to presume that the longer harness racing season could be a factor supporting the higher local admissions tax. It could have been anticipated that there would be greater municipal costs attendant upon a lengthier season. The conduct of harness racing during winter months may also be conceived to have been a factor since the cost of municipal services for the track may be greater at that time than during other months of the year. The Legislature may very well be presumed to have authorized the higher local admissions tax to offset these reasonably conceivable increased municipal costs.

CONCLUSION

For the foregoing reasons and those stated in the brief filed in support of the motion to dismiss or affirm, the appeal should be dismissed, or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

MORRIS H. SCHNEIDER,
County Attorney of Nassau County,
Attorney for Appellees.

SEYMOUR S. ROSS,
Senior Deputy County Attorney,

JEROME F. MATEDERO,
Deputy County Attorney,

Of Counsel.

December 31, 1966.